
Topic 2-1: Introduction to Copyright A: “Works, Rights and Ownership of Copyright”

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1. Introduction

Today we have 90 minutes to discuss the key elements of the copyright system. I propose to break my presentation into two shorter, 30 minute presentations, with time for questions after each of the presentations.

The first session will cover the ownership of copyright and the works and rights that comprise the copyright system, and the second, the use of, and access to, copyright works.

2. Rationales for Copyright Protection

The objective of copyright is to enrich society and the public good by encouraging and fostering cultural and scientific activity.

To demonstrate its importance to culture and society, copyright is recognised as one of the Human Rights in the Universal Declaration of Human Rights. Copyright protects cultural works, the creative expression of thoughts and feelings. These works are in a variety of forms, art works, music, novels and poetry.

In our increasingly globalised world, individual cultural expression is the means of people from other cultures experiencing and learning about the thoughts and feelings of other people. As a consequence, copyright becomes even more important as it is the internationally accepted means of protecting creators, whose works give voice to our culture.

There are two key aspects to the copyright system. Firstly, copyright has an economic role. Copyright provides creators or authors of works with a set of exclusive rights over the works that they create. These rights enable copyright owners to control the use of their works and to negotiate payment for their use. The economic benefit encourages them to create more works, which is of benefit to society as a whole.

The other important aspect of copyright is its protection of moral rights – the rights of the author. These rights are very different from the economic rights of copyright but are equally important. They, by giving rights to the author to be attributed or to object to the derogatory treatment of their work, promote the status of the author in our society and increase our respect and appreciation for cultural works.

The central instrument for the protection of copyright is the Berne Convention. The Berne Convention was established in 1886 and currently has 163 member countries. Bangladesh became a member in the Berne Convention in 1999. The Berne Convention sets out the minimum standards of copyright protection for its member countries.

The Berne Convention provides standards for the term of protection of copyright and guidelines on exceptions to copyright owners’ exclusive rights.

The standards for protection of rights contained in the Berne Convention are incorporated into later treaties, such as the 1994 World Trade Organisation’s Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), and the World Intellectual Property Organisation’s Copyright and Performers and Phonograms Treaties of 1996. The 1996 WIPO treaties were drafted to take into account recent digital developments and their effects on copyright interests.

3. Works Protected by Copyright

To understand the copyright system we must understand exactly what the term “works” means in the copyright system. There are a number of rules that define which “works” are eligible for copyright protection.

Firstly, the work must be fixed in material form – this means that a work has to be permanent and perceptible. When computers were first invented there was some debate about whether works stored in a computer memory were in a material form as they could not be seen or heard without the computer being used. However this question was settled and material form is now understood to mean any form of storage from which the work can be reproduced.

Another requirement for protection is that the work must be created by a human author who is a citizen of one of the countries which are also signatories to the Berne Convention.



This means that works by animals, no matter how talented, are not protected as copyright works. The same rule applies to computer generated works.

The principle of National Treatment is an important element of this role. It ensures that copyright owners from Berne countries are given the same protection as local copyright owners when their works are used in foreign countries that have entered into the Berne Convention.

In order to be protected, a work must be original. This does not mean that they must be unique or valuable. What it means is that the work must be the product of the skill and labour of the creator and not copied from another work.

This is not a particularly high standard and copyright protection does not depend on any aesthetic requirement or value judgement. Rather it depends on the skill and effort that goes into the creation of a work. This means that a simple sketch or plan for a house can be protected, as can a private letter or email.

Another requirement is that copyright protects expressions of ideas, not the ideas themselves. What does this mean? Think about a love story – a couple meet, they fall in love, they are separated, then reunited and live happily ever after. This storyline is an idea and its expressions would be in any number of books, movies, poems – each of which is protected by copyright – copyright protects the expression, but it doesn't protect the ideas. This is to encourage the reuse, criticism and discussion of the ideas contained in the work itself.

Some common examples of copyright works are;

Category of work	Examples
Literary works	Novels, poems, scientific articles, film scripts
Choreographic works	For ballet or dance
Artistic works	Paintings, drawings sculpture, cartoons, maps, designs, photographs

Musical works	Musical pieces with or without words
Cinematographic works	Films, television shows, video games

The list in The Asian Copyright Handbook is slightly different. This is because it is open to different national governments to describe the works that are protected by copyright in different ways. You will find that Bangladesh Copyright Law may arrange the categories of protected works differently as well.

However, a quick look at the examples in the table above shows us that typically these works are:

- Fixed in material form
- Created by a human author
- Original
- Expressions of an idea.

In addition, the Berne Convention gives governments the scope to make special rules for certain categories of material, as follows:

a) *Translations*

Translations, adaptations and arrangements of works will be protected as original works. This means that if you translate a work that is in or out of copyright you will have a copyright in your translation. You can control the use to which your translation is put but you cannot stop another person translating the original work into their own words into the same or a different language.

If the original work that you want to translate is in copyright you will need to obtain the permission of the copyright owner in the original work for the translation to be made. This is because translation is a copyright right.

Experience in a number of developing countries can be that it is difficult to obtain translation rights from foreign copyright owners. I don't know if this is a problem in Bangladesh, but if it is we can discuss it at the workshop tomorrow.

b) *Collections of Works*

Collections of works such as encyclopaedias can also be protected by copyright. This copyright is independent of the copyright in the individual works or information making up the compilation. In order to be protected however, the selection and arrangement of the works has to be sufficiently original to create a copyright right in the collection itself.

The threshold of originality required for this protection varies amongst countries. For example in Australia the telephone book and the television guide are considered to be sufficiently original to attract copyright protection, but in some other countries this is not the case.

c) *Legislation and other Government Publications*

Governments can also decide whether or not to provide copyright protection for certain categories of works. These include legislation and official texts of an administrative nature. The approach often depends on the philosophy of the government concerned and the culture in the country. For example, in the USA all government publications are copyright free. The Australian government has retained copyright in its publications, and licenses these copyrights to publishers.

Each of these decisions is motivated by a desire to make access to government publications as easy as possible. In the USA it is felt that removing copyright protection means that participants in the free market economy will take up the opportunity to republish the works which will then become more widely available.

In Australia the government licenses the copyright to others, and controls the production of government materials. This also ensures that the access is to the correct and authorised version of legislation or legal cases.

Governments can also choose the extent to which political speeches, lectures and addresses can be reproduced by the press for informational purposes.

d) *Neighbouring Rights*

Also, there is a specific type of copyright protection given to those involved in the production or transmission of works. The thinking here is that these activities value add to the copyright works, and should be protected independently. These works are called neighbouring rights.

The most common examples of neighbouring rights are:

- record companies have a copyright in their sound recordings
- broadcasters have a copyright in their broadcasts, and

- performers have a copyright in their performance.

Neighbouring rights are akin to copyright as they grant exclusive economic interests to those who have been involved in the production of copyright works.

However, neighbouring rights are often distinguished from copyright in original works in various ways – usually they apply in more limited circumstances, or a more limited set of rights are attached to them.

For example in Australia, broadcasts are only protected for 50 years from their first publication; and sound recordings and cinematograph films have a copyright for 70 years from their first publication. The term of protection for original copyright works, is the life of the author plus 70 years.

It is important to remember that these neighbouring rights exist independently from the copyright in original copyright work being transmitted or produced. This means that separate copyrights can exist in the one item – for example, in a CD of musical works there might be a copyright in the original composition, a copyright in the performance and a copyright in the sound recording itself – each owned by a different copyright owner.

4. The Rights of the Copyright Owner

Copyright is often referred to as a bundle of rights. What that means is that copyright is a set of rights to manage and control particular uses of works. If the use of the work is not one that is specified as a copyright use, the copyright owner does not control that particular use of their works.

Although there is a core set of copyright rights (as set out in the Berne Convention) these rights can be described differently in different countries.

Sometimes the rights differ between countries, as some countries might give copyright owners greater rights than the bare minimum specified in the Berne Convention. For example, Japan has a display or exhibition right for artistic works but that right doesn't exist in Australia.

This is also the situation with moral rights. In some countries – mainly those with a European tradition, authors have very high standards of protection of their moral rights. In others, those with an English or common law tradition, the rights can be much more

limited.

It is also important to note that sometimes not all copyright works have the same rights attached to them. This often derives from the fact that different copyright works are used in different ways. For example, a right of display or exhibition is more important to owners of artistic works than it is to owners of literary works.

a) *Economic Rights*

I will firstly consider the economic rights of copyright. Here are some examples of typical copyright rights and examples of how they are used:

Right	Explanation	Example
Reproduction	To copy or reproduce. It can be in a different form including sound or visual recording	Photocopying, photography, printing, recording
Performance	To publicly perform It includes individual performances as well as playing CD's in public or using speakers to broadcast	Playing CD's in a shop, performing a play in a theatre
Communication to the public	Broadcasting by wire or wireless including one to one communication on the internet	Radio, television, internet use, email
Publication or distribution	Make the work available to the public for the first time	Publishing a book
Adaptation or translation	Making a translation or dramatised version of a literary work	Screenplay of a book, translation of an English work into the Bengali language

In addition to the most common rights as mentioned above, other rights exist in some countries or for specific categories of copyright material. Some examples are:

The right of display or exhibition which can apply to artistic works

- The right of rental which usually only applies to films or CD's.

b) *Moral Rights*

Moral rights protect the honour and reputation of creators. The rationale for moral rights is that creative material is an emanation or extension of the creator's personality and what is done with their copyright works may affect their standing and reputation.

Moral rights provide an ongoing connection between the individual creator and his/her audience. They ensure cultural and educational best practice by requiring correct attribution and faithful reproduction of works.

There are three basic types of moral rights:

- an author's right to be attributed as the creator of a work (including the right not to be falsely attributed as the author of a work);
- an author's right to object to derogatory treatment of his or her work which prejudicially affects his or her honour or reputation (the right of integrity of authorship of a work); and
- the right of disclosure – the right to determine if and when material is made public.

The Berne Convention only mentions the rights of attribution and integrity of the author of a work (the first two points above) and not the right of disclosure. This means that in some countries, such as Australia, creators only have the first two of these moral rights. In other countries, such as Japan, creators have all three moral rights.

Moral rights generally endure for the same period as copyright in a work – for Australia, much of Europe and the US that is 70 years after the death of the author. Moral rights can be waived by written agreement by the author. However, unlike economic rights they are not assignable or transferable. Once the author has died, his or her heirs have the ability to exercise moral rights over the author's works.

In Australia moral rights over works automatically apply. However, in some countries, such as the UK and New Zealand, authors must assert their moral rights if they want to benefit from them.

5. Ownership of Copyright

One of the most important things to note about copyright is that it is a set of rights given to the creator or author of a work. We have already discussed the different categories of copyright works, and the different rights given to copyright owners.

We need now to consider the rules that apply to ownership – who is the copyright owner and therefore entitled to control the uses being made of the work.

The first and most important thing to note is that ownership of copyright exists independently of the ownership of the physical item containing the work. If for example an artist creates a painting and then sells it, the copyright in the painting doesn't automatically pass to the new owner of the painting – it stays with the artist. Similarly when you buy a book, you are merely buying a copy of the work – not the rights to translate or reproduce the work contained in the book.

The general rule is that the first owner of copyright is the creator, the author or artist whose creative ideas are expressed in the work. Someone who acts as a mere scribe, taking down dictation, does not qualify as an author.

If there is a single author, this is reasonably straightforward. However, if there is more than one author, we need to consider the rules that apply to joint authors.

A work of “joint authorship” means that two or more authors have collaborated in such a way that their contributions are not separate.

The test is whether each author has made a distinct contribution. If two authors work together, and each writes separate chapters of a book, they are not joint authors, because their contributions are distinct. This contrasts with the situation where each author contributes/edits the same work – they are then joint authors.

In the case of joint authors, no one author can exercise copyright rights without the consent of the other.

There are also several important exceptions to the general rule about copyright ownership.

a) *Employment*

If the creator of a work is employed and the

creation of the work is included in their duties at their work, then the copyright in their works will generally be owned by their employer.

For example when an employed journalist writes an article, their employer, the newspaper publisher is the copyright owner of the article. This means that the newspaper publisher, not the journalist can publish or syndicate the work. Similarly if someone is employed as a website designer, then websites they create in the course of their employment will be owned by their employer.

If an employee creates a work that is not related to their actual job, the employment rule does not apply. For example consider a schoolteacher who at weekends and evenings writes a textbook for use in schools. The teacher's employer is not the copyright owner of the work, as writing the textbook was not what they were employed to do. The teacher therefore is the copyright owner and can enter into a contract with a publisher to publish the work.

What about someone employed by the government to write text books for schools? In that case the copyright in the work would be owned by the employer, the government.

In some circumstances this rule can be difficult to interpret – for example some academics are employed by their universities to undertake teaching and research. If as part of their research they write a scientific paper, on weekends, then is the university the copyright owner or the academic? Because of these difficulties many universities have developed intellectual property policies that explain the way they apply the rules in more detail.

Another example is someone employed as a tour guide. Because this person has an interest in web design they agree to develop a website for their employer. Who is the copyright owner of the website? The answer might depend on whether the work was done during business hours or whether the author was paid separately to do the work. If he was paid separately to do the work, another ownership rule then becomes important – the rule with respect to commissioned works.

b) *Commissioned Works*

If you are commissioned by someone to create a work different ownership rules can apply. In some countries the person that commissioned the work is the copyright owner, for some or all

uses of the work. In other countries, the creator is the copyright owner. In other countries, the situation depends on the type of copyright work it is, and the use it is intended for.

For example in Australia until 30 July 1998 if you commissioned a photograph you were the copyright owner of the work. However in that year the rule was changed. The situation now depends on the purpose for which the work was commissioned. If photographs are commissioned for private or domestic purposes (i.e. wedding photographs), the client/commissioner retains copyright in the photographs. If they are commissioned for any other purpose – i.e. for commercial purposes, the creator retains copyright in the photographs.

c) Government Works

In some countries there are different rules if you are employed or commissioned by the government to write or create a work.

For example, in Australia where a work is created under the ‘direction or control’ of the Crown/ government, the government retains copyright in the work. This is beyond the general provision relating to employment which I referred to a little earlier – and covers works created by third parties who are not employed by the Crown. For instance, if a consultant is engaged to create a report under the ‘direction and control’ of the government, then the government has copyright in the report, even though the consultant is not a government employee.

The owner of the copyright is able to enter into arrangements to use and exploit their copyright works. I will talk about contracts in respect of copyright works in our next session.



Introduction to Copyright Works, Rights and Ownership

Caroline Morgan
Copyright Agency Limited, November 2007

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Rationales for Copyright Protection

- Protects and promotes cultural and scientific activity
- Fosters the creation of new works
- Provides access to works when it is in the public interest

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The Berne Convention

- International treaty
- 163 member countries
- TRIPS agreements and WIPO Copyright Treaty

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Elements of Copyright Protection

- Works
- Rights
- Ownership

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Works Protected by Copyright

- *“Every production in the literary, scientific and artistic domain”*
- A number of rules define eligibility for protection

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Material Form

- Permanent
- Any form of storage from which the work can be reproduced

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Human Author



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Original

- Not an aesthetic standard
- Product of skill and labour
- Sketches, plans, telephone books can be protected

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Ideas/Expressions

- Copyright protects expressions, not ideas
- Can be a difficult line to draw

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Examples of Copyright Works

Category of Work	Examples
Literary works	Novels, poems, scientific articles, film scripts
Choreographic works	For ballet or dance
Artistic works	Paintings, drawings sculpture, cartoons, maps, designs, photographs
Musical works	Musical pieces with or without words
Cinematographic works	Films, television shows, video games

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Special Rules - Translations

- Translations are copyright works
- Translating copyright works requires the consent of the copyright owner

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Special Rules – Collections of Works

- Collections can be protected as original copyright works
- Must be 'original' in their selection and arrangement

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Excluded from Protection

- Some works can excluded from copyright protection
- Legislation, official texts
- Political speeches, lectures – reproduced by the press

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Neighbouring Rights

- Value added activities
- The production or transmission of works
- Sound recordings, broadcasts, performances

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Copyright Rights

- Bundle of rights
- Economic rights
- Moral rights

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Economic Rights

Right	Explanation	Example
Reproduction	To copy or reproduce. It can be in a different form including sound or visual recording	Photocopying, photography, printing, recording
Performance	To publicly perform It includes individual performances as well as playing CD's in public or using speakers to broadcast	Playing CD's in a shop, performing a play in a theatre

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Economic Rights

Right	Explanation	Example
Communication to the public	Broadcasting by wire or wireless including one to one communication on the internet	Radio, television, internet use, email
Publication or distribution	Make the work available to the public for the first time	Publishing a book
Adaptation or translation	Making a translation or dramatised version of a literary work	Screenplay of a book, translation of an English work into the Mongolian language

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Moral Rights

- Attribution
- Object to derogatory treatment
- Disclosure

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Ownership of Copyright

- First owner is author
- In course of employment = employer
- Commissioned works
- Government works

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Joint Authorship

- If each author makes a distinct contribution – they each own the copyright in their contribution
- If the authors collaborate in such a way that the contributions are not separate = joint authors
- Can't exercise copyright rights independently

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Employment

- Included in their duties at work = employer is copyright owner
- If independent of their employment = creator is copyright owner
- Useful to have an agreement up front

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Questions?

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Topic 2-2: Introduction to Copyright B: “Use of and Access to Copyright Works”

Caroline MORGAN, General Manager, Corporate Services Division, Copyright Agency Limited, Australia

1. Introduction

In this part of my presentation I will focus on the use of and access to copyright works. Just as there is a public interest in promoting and protecting copyright works and copyright owners there is also a public interest in promoting access to the copyright works of others. Of course, this access must be on terms that do not prejudice the legitimate interests of the copyright owner.

Access to creative works is important, in enabling each of us to share in that creativity, to learn from and to experience the thoughts and emotions expressed in those works.

Access to copyright works may encourage us to create new works, thereby enriching our culture, or we may learn from those works, increasing our skills and education levels. The works may also entertain us and provide enjoyment.

Achieving the right balance between protecting the rights of creators over their works and the access to those works by others is one of the key objectives of copyright law.

In order to better understand the factors that achieve the balance in a copyright law, I will firstly consider the “checks and balances” in the copyright system itself – the limitations on the scope of copyright protection, some common exceptions to copyright and the adoption of compulsory licensing by governments as a means of promoting access to copyright materials.

I will also consider the matters to be taken into account when entering into contracts for the use of copyright material.

2. Using Copyright Works

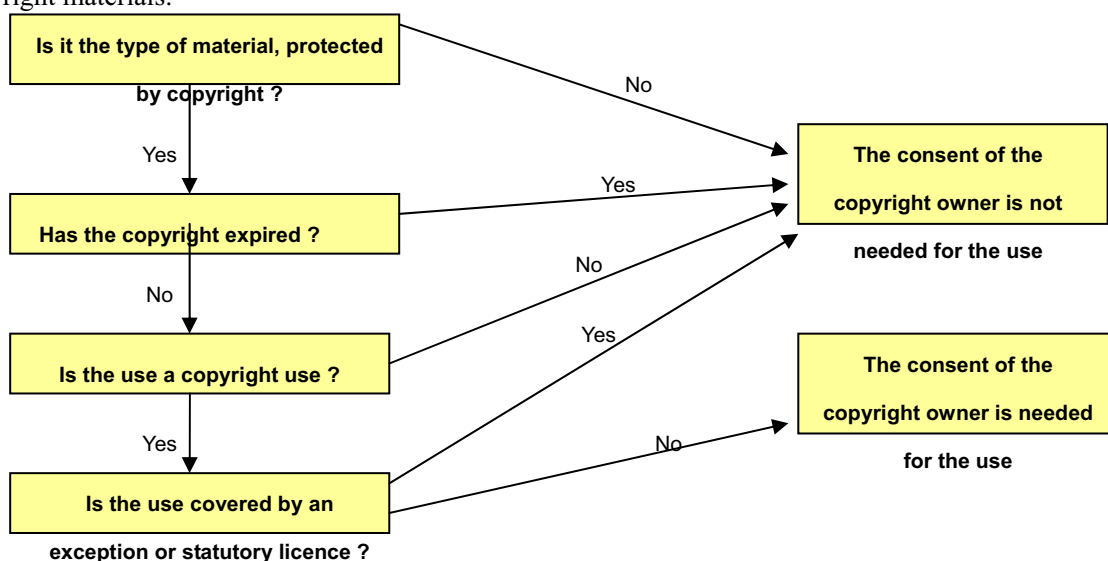
As I discussed earlier copyright is a property right, and similar protections for copyright owners exist as exist for the owners of other property rights – such as property in land and physical items.

This means that it is an offence, sometimes a criminal offence, to use a copyright work in any of the ways protected by copyright unless you have either:

- The use is permitted by an exception to copyright, or a statutory licence.
- The copyright owner’s permission (either individually or through a collecting society); or

However, if the use being made of a work is not a copyright use or the copyright has expired the work can be used freely. Therefore it is important to be aware of the scope of copyright protection and its limits. An example is if the copyright in the work has expired then the work is no longer protected by copyright. The work is in the public domain and it can be used freely.

This series of steps can be illustrated as follows



I will now consider each of these steps in more detail.

3. Scope of Copyright Protection

The monopoly that the Berne Convention grants copyright owners over the use of their works is limited in a number of ways. Limitations on copyright rights balance the public interest in promoting copyright protection against a number of other public interests.

a) *Is the Work a Copyright Work?*

Remember from our earlier discussion, that there are conditions that must be satisfied before a work has copyright protection in the first place. These requirements are that the work is;

- Fixed in material form;
- Created by a human author;
- Original;
- Expression of an idea.

In addition, even if the work has, or had copyright protection, that protection might not apply, for example, if the copyright in the work had expired.

b) *Term of Protection*

Copyright protection is limited in time. That is, the Berne Convention provides that a creator has control over their works for a minimum of their life plus an additional 50 years.

However, increasingly the duration of copyright is being extended to the life of the author plus 70 years, particularly in Europe and in the USA.

Once the copyright term expires, the copyright material becomes part of the public domain and available to all to use without needing to seek the author's permission or to rely on an exception.

c) *Substantial Part*

In order for a copyright use to take place the proportion of the work used must be "substantial". Whether a proportion of the work is substantial or not depends on a number of factors, such as the significance of the part used, and the circumstances of the use. This means it is not possible to provide a general guideline as to the size or amount that would be appropriate to be used without requiring the

permission of the copyright owner in all circumstances.

Even if none of the above limitations apply, the work is in copyright and the use you wish to make is a copyright use, there are some permitted exceptions to the rights the copyright owner controls. These exceptions enable the use of works in some specific circumstances.

The next step is to identify if any of the possible exceptions in copyright law apply to the use you want to make of the work.

4. Exceptions to Copyright

Copyright exceptions are a means of balancing protection of copyright works and access to them. They allow copyright material to be used for certain purposes without the permission of the copyright owner if the use of that material meets certain public policy objectives.

These exceptions to copyright apply in different circumstances depending on the national context in the country concerned. However, exceptions to copyright contained in national laws are required to be consistent with the standards of protection set down in the Berne Convention. The Berne Convention also provides the test against which any proposed exceptions to copyright owners rights are to be assessed. This test is called the *three step test*.

Exceptions to copyright recognise that in certain circumstances, the value of the community having access to copyright material outweighs the public interest in protecting the interests of the individual copyright owner.

5. The Three Step Test – a Guide to Exceptions and Limitations

As mentioned above, the Berne Convention recognises that in certain circumstances, governments will want to legislate for exceptions to the exclusive rights of copyright owners.

The test for deciding in which circumstances exceptions to the reproduction right can be introduced into legislation is contained in Article 9(2) of the Berne Convention. Article 9(2) reads:

It shall be a matter for legislation in the countries of the union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

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This test, which has become known as the *three step test*, was extended to apply to all uses of copyright material (rather than only to the reproduction right) by the TRIPS Agreement.¹

Its application to works in digital form was confirmed by the WIPO Copyright Treaty.²

The *three step test* provides that exceptions to copyright can only be justified if they:

- Apply only in certain special cases – this implies that the exceptions to copyright must be clearly defined, narrow in scope and reach;
- Not conflict with the normal exploitation of the work - the uses permitted by the exceptions to copyright must not be of considerable or practical importance or economically compete with the author's interests; and
- Not unreasonably prejudice the legitimate interests of the author – the legitimate interests of the author include both moral and economic rights. It may be that if the exception to copyright provides for a payment to the copyright owner then permitting a use in legislation will not unreasonably prejudice the interests of the copyright owner.

Governments use the *three step test* in deciding how to frame the exceptions that they will adopt in their national copyright laws. Even though many of these are specific to individual natural circumstances, there are a number of exceptions to copyright that appear in the copyright law of most countries. I will now review some of these common exceptions.

6. Examples of Common Exceptions to Copyright

There are several exceptions to copyright that in many countries are considered to be consistent with the *three step test*. However, it is important to note that these are limited exceptions, not broad use rights. The scope of these exceptions must be construed narrowly so as to comply with the *three step test*.

It is also important to note that many of the commonly accepted exceptions were developed in the time before digital use of copyright works. As

such they may not be appropriate for the digital environment. In fact one of the questions many national governments are struggling with is how to best shape their copyright laws to take account of the digital environment.

There is an ongoing debate at the international level as to how exceptions to copyright should apply in the digital world.

The vast explosion of copying and musical works, by individuals in file sharing networks and the growth of licensed download services, such as i-Tunes, has led to a rethinking of the scope of exceptions, such as those for private copying. As digital technology and digital rights management develops, the view that private copying exceptions should be replaced by direct licensing by the copyright owner is gaining acceptance.

Following is a table which sets out several common exceptions to copyright owners' rights:

¹ Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement).

² WIPO Copyright Treaty 1996.

Exception	Explanation	Comment
Use by disabled readers	Provides access to works by the visually impaired, as the works may not be in the format they require	Digital networks provide great opportunities for the visually impaired, however care must be taken to ensure that copies made for this purpose do not find their way into the general market for copyright goods
Fair dealing for research and study	Use by a student related to a course of study they are undertaking	The fairness requirement means that the scope of these exceptions cannot involve copying the whole or a substantial part of the book
News reporting	Only as much as is required to report the news	This is an important exception, but the scope of the term “news” is subject to debate – it generally means “the news of the day”
Criticism and review	For the purposes of reviewing or analysing another work	Requires acknowledgment of the original source. The amount used cannot be so much as to substitute for the original
Legal proceedings	For individuals to inform themselves of the law when they are involved in legal matters	Again, the scope is limited, and does not include all copying by lawyers for example
Copying by libraries	To assist patrons exercising fair dealing exceptions and for preservation and archiving purposes	The scope is limited to the equivalent of fair dealing uses, and does not extend to commercial document supply, or libraries in commercial undertakings

A common feature of each of these exceptions is that the uses of copyright permitted by them are limited. Such limited uses are considered not to prejudice the interests of the copyright owner, and consequently to be consistent with the *three step test*.

A variation on the ‘exception’ system of specifying particular uses that can be made of copyright works without infringement is the fair use system – developed in the USA.

In the fair use system, instead of a list like the one above, a general provision enabling the ‘fair use’ of copyright material is included in the Copyright Act. It is then left to the courts to decide if a particular use of a copyright work is fair in the particular circumstances. In order to do this the courts use a test similar to the *three step test*.

The key benefit of the fair use system is considered to be its flexibility – as it can apply to new uses of copyright works without requiring a change to legislation. However, it also means that there is uncertainty whether a particular use is fair, unless it has been litigated.

The key benefit of the fair dealing system is its certainty. Because the exceptions are specified in law, the users of copyright material know what

uses will be considered fair.

In either system, the uses that are considered to be fair and therefore permissible, are very similar.

7. Collective Licensing

In some circumstances there are uses of copyright material for which a strong public policy objective exists but the copying impacts on the interests of individual copyright owners and their ability to exploit their works.

An example of such a situation is copying in the educational context. Many schools and universities make copies of copyright material and provide it to their students. The use is extensive and does impact on copyright owner’s markets as very often the copies substitute for text books. However making and using the copies is essential for important social purposes such as education, development and training.

Also consider the use of copyright materials in the home – where time shifting of television or the making of a copy of a sound recording to use in the car are common. However obtaining a licence to undertake such activities from every copyright owner would be time consuming and many would not seek to do so, although a legal liability exists.

CHAPTER II

Similarly, nightclubs and bars often play music, which is considered to be an essential component of the ambience of such establishments. For these venues to obtain the rights to play music from each composer individually would be impossible – particularly for those using the radio. Nevertheless, as a copyright use, the nightclubs and bars have a legal liability to pay the copyright owners concerned.

In such circumstances governments will consider mechanisms that will permit the copying to take place, but accompanied by a payment to the copyright owners whose works are being used. They may adopt mechanisms to encourage copyright owners to enter into collective management of their rights or they will introduce compulsory or statutory licensing.

a) *Encourage Voluntary Arrangements*

There are a number of legal techniques through which governments can support voluntary collective management.

In the UK, Canada and Hong Kong, statutory provisions encourage users and rightsholders to enter into voluntary agreements. Examples of these types of provisions include a presumption that if you have entered into a licence agreement with a collecting society, you are entitled to assume that all works of the same type are included in the licence unless specifically excluded.

b) *Legal, statutory or compulsory licence*

In compulsory or statutory systems the government grants a right to copy in law accompanied by a right for copyright owners to receive payment. Non-voluntary systems are of two types - statute based licence schemes or levy systems.

As well as the right to copy being granted in law sometimes the royalty or remuneration payment is also determined by law. Sometimes the copyright owners can negotiate the remuneration with users (although they are not able to refuse authorisation). In many countries, if the parties fail to agree, then the payment can be determined by a government tribunal or board.

A feature of many non-voluntary licence systems is government appointment or approval of a specific copyright management organisation to manage the licence on behalf of

all copyright owners.

For example, in Australia both the statutory licence schemes for copying in the education and government sectors are administered by CAL through government appointment. The licence fees charged by CAL are negotiated with the copyright users and if there is failure to agree, set by a government tribunal, the Copyright Tribunal.

In Singapore, Fiji and Samoa, although a compulsory licence is provided for in copyright legislation, there is no requirement that rightsholders be represented by a single government approved RRO, as in Australia.

The Dutch RRO, Stichting Reprorecht, administers a non-voluntary system in the educational and government sectors. The remuneration is established by government regulation. Statistical surveys are used to determine the quantity of copying and which works are being copied. The split of fees between authors and publishers is also determined by government regulation.

c) *Levy system*

The equipment levy approach acknowledges the difficulty in tracking the making of single copies for private and personal use and also acknowledges the importance of making payment to copyright owners. This system makes payments to copyright owners by imposing a levy on copying equipment.

The first country to introduce a levy system on equipment used for photocopying was Germany in 1958 and it has recently been widely adopted by countries in Eastern Europe such as Poland. The levy is paid by and collected from the manufacturers and importers of copying and fax machines, printers and scanners. In addition to the equipment levy, an *operator levy* is paid by large-scale users, such as schools, universities, research institutes and copy shops. The tariffs for both the equipment levy and the operator levy are determined by law. A collecting society distributes the fees to copyright owners.

Similar equipment levy systems have been adopted in Spain, Belgium, Greece and Nigeria.

However advances in digital technology are making the monitoring and tracking of the use of works for personal use a reality and there are moves in Europe to replace levy systems

with licensing systems – either individual licensing or collective management systems.

8. Contracts for Copyright Works

If you want to make use of a copyright work and it is not permitted by any of the exceptions or statutory licences mentioned above, then you will need to enter into a contract with the copyright owner.

The copyright owner has the right to negotiate the terms of the use, including payment and if agreement cannot be reached the use cannot take place.

Common examples of situations in which individual contract negotiations take place are when someone wants to translate a work, when someone wants to publish a work, or use an artistic work on a calendar or book cover.

One important thing to ensure is that you are negotiating with the right person – often the owner of the work (such as the owner of an artistic work) may not be the person with whom you need to negotiate.

Possibly one of the ownership rules I explained earlier applies and negotiations should be with the employer rather than the actual creator. Or, possibly the copyright owner has joined a collective management organisation and the use rights can be negotiated with that agency, acting on behalf of the copyright owner.

The next thing to consider is whether the contract needs to be in writing. In some countries there is a legal requirement that assignments of copyright need to be in writing. For example, Bangladesh copyright law requires that transfers of ownership must be in writing.

Even if the contract is not required to be in writing, there are good reasons to do so anyway, as that avoids misunderstandings both at the time the contract is negotiated and later if there is a question about the scope of the contract.

Then the basic rules of contracts apply – you need an offer and acceptance, and some consideration or payment, even if it is just a token amount. Clear descriptions of who the parties to the contract are and what are the work and rights covered by the contract are also important.

When considering the rights needed, consider whether an assignment (a transfer of ownership) or a licence (permission to use the work) is necessary

and if a licence is preferred whether that licence should be exclusive or non exclusive.

In another session we will look more closely at contracts in the publishing industry and the drafting of sample contracts.

9. Infringements of Copyright

If you use someone else's copyright work without permission and an exception does not apply to the use then you will have infringed another's copyright.

Infringement of copyright can be a civil infringement or a criminal infringement. The distinction is drawn as a result of the seriousness of the illegal use of someone's copyright work that has occurred.

If it is of a more minor nature – say a small number of copies made for personal use, it is usually defined as a civil infringement.

If the offending use of another's copyright works is on a broader, perhaps commercial scale, then it is usually considered a criminal offence. One reason for this distinction is the effect that the different infringements will have on the copyright owner's legitimate interests in their work. If I make one or two offending copies of a work, its effect on the author's market will be small, and the loss they have suffered will be small. If I make many copies of a work the detrimental impact on the copyright owner's market will be greater.

Naturally, where a criminal infringement is found to have been perpetrated, the punishment will be greater than where the infringement is civil.

Many countries have established specialist Courts or Tribunals to hear infringement cases. They have expertise in both copyright, to assess where copyright infringement has occurred, and what sort of infringement it is. Additionally, they have expertise in quantifying damages suffered as a result of infringement, and therefore in setting appropriate remedies to the copyright owner, and other punishments for the offender.

**Introduction to Copyright
Use of and Access to
Copyright Works**

Caroline Morgan
Copyright Agency Limited, November 2007

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Using Copyright Works

- Is the work copyright protected ?
- Does an exception or statutory license apply ?
- Do I have the copyright owner’s permission ?

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Using Copyright Works

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    graph TD
      Q1[Is it the type of material, protected by copyright?] -- No --> A[The consent of the copyright owner is not needed for the use]
      Q1 -- Yes --> Q2[Has the copyright expired?]
      Q2 -- Yes --> A
      Q2 -- No --> Q3[Is the use a copyright use?]
      Q3 -- Yes --> B[The consent of the copyright owner is needed for the use]
      Q3 -- No --> Q4[Is the use covered by an exception or statutory licence?]
      Q4 -- Yes --> A
      Q4 -- No --> B
    
```

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Using Copyright Works - Limitations

- Term of protection
- Only certain rights
- Expression of ideas, not the ideas themselves
- Public domain

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Using Copyright Material - Exceptions

- Even if a work is in copyright there may be circumstances in which you can use it without seeking permission
- Substantial/insubstantial use
- “Exceptions” to copyright – in copyright legislation – the three step test

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Exceptions and Limitations

- Three step test
 - Certain special cases
 - Not conflict with normal exploitation
 - Not unreasonably prejudice the legitimate interests of the author

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Examples of Exceptions

- Fair dealing – research and study; reporting the news; criticism and review
- Fair use
- Library copying
- Disabled readers

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Common Exceptions to Copyright

- Use by disabled readers - Provides access to works by the visually impaired, as the works may not be in the format they require
- Fair dealing for research and study - Use by a student related to a course of study they are undertaking
- News Reporting - Only as much as is required to report the news

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Common Exceptions to Copyright

- Criticism and review – For the purposes of reviewing or analysing another work.
- Legal proceedings – For individuals to inform themselves of the law when they are involved in legal matters.
- Copying by libraries – To assist patrons exercising fair dealing exceptions and for preservation and archiving purposes.

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Collective Licensing

- Strong public policy objective, for example education
- To permit the use for free would conflict with the three step test

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Collective Licensing Mechanisms

- Encourage voluntary arrangements
- Statutory or compulsory licences
- Levy system

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Contracting for Copyright Works

- If a limitation, exception or statutory licence does not apply, will need the copyright owner's permission for the use
- Negotiations with the copyright owner
- Writing ?

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Infringement of Copyright

- Owners of copyrights have exclusive rights to deal with their works in certain ways
- Require permission of copyright owner to deal with work in one of these ways, otherwise infringement of copyright

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Infringement of Copyright

- Civil
- Criminal/piracy

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Questions?

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